# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD SEVENTH REGION

COMAU, INC.

**Employer** 

and Case No. 7-RD-3644

AUTOMATED SYSTEMS WORKERS LOCAL 1123, A Division of MICHIGAN REGIONAL COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Union

and

WILLIE RUSHING, an Individual,

Petitioner

and

COMAU EMPLOYEES ASSOCIATION (CEA)

**Intervenor** 

## INTERVENOR'S REQUEST FOR REVIEW OF DECISION AND ORDER OF THE REGIONAL DIRECTOR

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### REQUEST FOR REVIEW OF DECISION AND ORDER OF THE REGIONAL DIRECTOR

Intervenor Comau Employees Association (CEA) requests review of the Regional Director's December 14, 2010 decision to dismiss the decertification petition and refuse to conduct an election in this case, on the following grounds:

- 1. The Regional Director's decision raises substantial questions of both law and policy because:
  - a. There is no Board precedent for the Regional Director's position that
    employee dissatisfaction resulting in a sufficient number of signatures on a
    decertification petition was caused by an unfair labor practice that had not yet
    occurred; and
  - b. It is a departure from officially reported Board precedent to assert that employee dissatisfaction resulting in a sufficient number of signatures on a decertification petition could be caused by an unfair labor practice which had not yet occurred.
- 2. The Regional Director's decision on the central factual issue in this case, i.e., whether the employer's single unfair labor practice of March 1, 2009 caused the employee dissatisfaction which had existed before that date, is clearly erroneous on the record, and has substantially and prejudicially affected the rights of the members of the bargaining unit by denying their Section 7 rights to elect their collective bargaining representative.

### Introduction

On December 3, 2008, the employer in this matter announced that collective bargaining negotiations had reached an impasse, and that it would impose its Last Best Offer. The LBO

became effective, following the required notice period, on December 22, 2008. The LBO included new health care provisions which would require employees, for the first time, to pay part of their health care premiums, make co-payments for office visits, and to incur other health-care-related costs. The ASW<sup>1</sup>, which then represented the employees, filed a charge with the Regional Director alleging that imposition of the LBO had constituted an unfair labor practice because impasse had not yet occurred. (Case No. 7-CA-51886) The Regional Director found that impasse had occurred, and that the imposition of the LBO had not constituted an unfair labor practice. At the request of the ASW, the General Counsel's Office of Appeals reviewed that decision; the General Counsel affirmed the Regional Director's decision that the imposition of the LBO on December 22, 2008 had **not** constituted an unfair labor practice.

In February of 2009, the employees began to sign a decertification petition. The record at the hearing (discussed in more detail below) reflects that they were dissatisfied with the ASW for a number of reasons, including, but clearly not limited to, the new health care provisions which had been **legally imposed** on December 22, 2008. Ultimately, 104 employees signed the decertification petition, a number which the Regional Director found sufficient to require an election. Out of 104 who signed the petition, 70, i.e., more than two-thirds of the signers, and over 30 percent of the unit, had signed before March 1, 2009.

March 1, 2009 is the significant date in this case. The health care provisions, which had been set forth in detail in the imposed LBO, became effective, by the terms of the LBO itself, on March 1, 2009. On July 28, 2009, the ASW filed an amended charge (Case no. 7-CA-52106) taking the position that the effective date of the health care provisions constituted a separate act by the employer occurring on March 1, 2009, that impasse no longer existed on that date, and

<sup>&</sup>lt;sup>1</sup> Automated Systems Workers Local 1123, a division of Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America.

that the imposition of the health care provisions constituted an unfair labor practice. That position was affirmed by Administrative Law Judge Bogas, and again by this Board (without discussion). That is the only unfair labor practice involved in this case, and it alone is the basis for the Regional Director's decision to dismiss the petition.

It is well-established that an employer's unfair labor practice can cause the bargaining unit members to become dissatisfied with their union, and that a decertification petition can be dismissed if there is substantial evidence that the dissatisfaction which led to the petition was the result of the employer's unfair labor practice. But in this case, the employees were dissatisfied as the result of events prior to the unfair labor practice. As will be shown below, that fact is clear in the employee testimony, and is also clear from the fact that the majority of those who signed the petition did so **before** the unfair labor practice. There is no Board precedent for the idea that an employer's unfair labor practice can be attributed to dissatisfaction which existed before it occurred, as the result of legal and permissible employer behavior.

The Regional Director stated in the Decision and Order that the dissatisfaction was "inextricably intertwined" with the March 1 unfair labor practice. (Decision and Order, p 7). But none of the Regional Director's rhetorical flourishes can disguise the fact that the dissatisfaction existed **before** the March 1 unfair labor practice. Board precedent permits the Regional Director to dismiss the petition only where the unfair labor practice has caused the dissatisfaction. To reach the desired result, the Regional Director was forced to disregard the Board's long-standing and fundamental requirement of causation, and concoct instead a new theory of anticipation, i.e., because the employees anticipated that the employer would do something they didn't like, even though that anticipation was the result of entirely legal behavior on the part of the employer, that

anticipation was enough to render them incapable of making a free choice of bargaining agent, even though no unfair labor practice had yet occurred.

The Regional Director's theory raises a dizzying array of possibilities for preventing elections. Suppose the health care plan had not gone into effect at all; that the employer had announced on March 1 that it would delay the process. Using the Regional Director's logic, all of the employee signatures before March 1 could be disregarded anyway, because the employees were dissatisfied about an event which they had anticipated. Using the reasoning of the Regional Director, the petition could be disregarded even though no unfair labor practice ever occurred. Indeed, the Regional Director could nullify any number of things based on any number of legal employer actions over an unlimited period of time. If true causation is no longer required, the only limit to the power of a Regional Director is his or her semantic creativity.

As a final note, it is striking that the Regional Director has contended throughout the many interrelated proceedings in this case that the events of December 22, 2008 are separate from, and should not be combined with, the event of March 1, 2009. That position is logically necessary for the Regional Director's position that the March 1 effective date of the health care provisions was a separate event from the December 22, 2008 LBO imposition (which both the Regional Director and the General Counsel had found to be proper). The Regional Director has needed to defend their separateness in order to make it possible for one to be legal and the other to be an unfair labor practice. Yet now he argues that the two events are "on a continuum" which forecloses separating the two events! (Decision and Order, p 7) The Regional Director's inconsistency is as striking as it is bold.

The Regional Director's "anticipation" and "continuum" theories lack one other element, i.e., supporting law. While the Regional Director has cited a number of Board cases in his

Decision and Order, not one of those decisions supports the novel theories that one can combine a continuum of pre-and post-unfair labor practice events, mix in employee anticipation of future events, and treat all resulting dissatisfaction as if it were caused by the unfair labor practice. In fact, not one of these decisions even discusses such a concept. Nor is the Intervenor aware of any such precedent.

Instead, all of the cited cases have one fact in common: the employer misconduct **preceded** the employee dissatisfaction. In other words, employee dissatisfaction resulted from a prior act of the employer. In none of the cases did the dissatisfaction result from later employer misconduct, or from anticipation of possible later employer misconduct.

For example, in *Hearst Corp.*, 281 NLRB 764, 764 (1986), the Board found that before the petition was circulated the employer had "engaged in numerous violations of Section 8(a)(1)," which constituted a lengthy chain of **prior** purposeful conduct designed to cause employee disaffection. In *Fruehauf Trailer Services*, 335 NLRB 393, 394 (2001), relying on the "too busy to negotiate" defense, the employer refused to meet with the bargaining agent for seven months **before** the disaffection petition was presented. And in *Guerdon Industries, Inc.*, 218 NLRB 658, 661 (1975), the employer unilaterally announced and imposed an incentive wage plan without discussing it with the union and threatened to withdraw the plan if the union negotiated a wage increase, all **before** the petition and withdrawal of recognition from the union.

In *M&M Automotive Group, Inc.*, 342 NLRB 1244, 1247 (2004), the employer unilaterally increased wages, unilaterally promoted five employees, and engaged in direct dealing, all **before** the petition which resulted in the withdrawal of recognition. Similarly, the employer's actions in *Penn Tank Lines*, 336 NLRB 1066, 1067 (2003), unilaterally changing pay provisions and wrongfully terminating a member of the union negotiating committee, occurred

**before** the petition. And in *Vincent Industrial Plastics, Inc.*, 328 NLRB 300, 302 (1999), the Board found that the employer had "committed a series of unfair labor practices **leading up to** the employees' February 16, 1995 decertification petition." (emphasis added).

Thus, despite citing a number of cases, the Regional Director provides absolutely no legal support for these novel and expansive theories that allow the commingling of past and future events, the disregard of sequence and causality, and reliance on employee "anticipation" resulting from entirely legal actions of the employer.

### STATEMENT OF PROCEDURAL FACTS

On April 14, 2009, Willie Rushing, an employee of Comau, Inc., filed a decertification petition seeking an election to decertify the Union, the ASW/MRCC ("ASW"). The petition, to which the Board assigned Case No. 7-RD-3644, was signed by more than 30% of the members of the bargaining unit. Mr. Rushing also filed a separate petition seeking recognition of the Comau Employees Association ("CEA"), the Intervenor in this case. The Board began the process of arranging the secret ballot election required by Section 9 of the Act.

On May 19, 2009, the ASW filed a charge with the NLRB alleging that the employer had engaged in bad faith bargaining (Case No. 7-CA-52106); that charge had the effect of blocking the election pending its resolution. On August 28, 2009, the Regional Director issued a Complaint against the employer in Case No. 7-CA-52106. The Regional Director further directed that a "St. Gobain" hearing be conducted in the matter of the decertification petition, Case No. 7-RD-3644, to determine "whether the unfair labor practices alleged in Case No. 7-CA-52106 bear a causal relationship to the employee disaffection reflected in the filing of the decertification petition." That hearing was to be conducted by the hearing officer who was to hear Case No. 7-CA-52106.

The consolidated matter was heard before ALJ Bogas from November 17 through 19, 2009. After hearing testimony in the unfair labor practice case, the ALJ closed the record in that matter and conducted a *St. Gobain* hearing in 7-RD-3644. (Tr 521) Consistent with the Order of the Regional Director, the ALJ then directed that the 7-RD-3644 be severed from 7-CA-52106 and the entire transcript be forwarded to the Regional Director for further proceedings in 7-RD-3644. (Tr 620-621)<sup>2</sup>

On December 14, 2010, the Regional Director issued his Decision and Order in this case, dismissing the decertification petition. This Request for Review is filed in response.

### THE LEGAL STANDARD BEFORE THE REGIONAL DIRECTOR

The right of the employees to freely choose their own collective bargaining representative is the foundation and bedrock of the NLRA:

It is hereby declared to be the policy of the United States... [to protect] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing... 29 USC §151.

Section 7 of the Act gives effect to that policy by providing that:

of the record in 7-RD-3644.

Employees <u>shall</u> have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing... 29 USC §157 (emphasis added).

The Act provides that, upon the filing of a petition by at least 30% of the employees in a bargaining unit who wish to rescind the authority of a union to represent them, "the Board shall take a secret ballot of the employees in such unit." 29 USC §159(e)(1) (emphasis added).

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<sup>&</sup>lt;sup>2</sup> While a complete copy of the transcript of the consolidated hearings was forwarded to the Regional Director, the record in 7-RD-3644, i.e., the case now before the Board, consists only of the Transcript beginning with page 521, where ALJ Bogas announced the closure of the hearing with respect to 7-CA-52106 and the opening of the hearing pertaining to 7-RD-3644. The record in 7-RD-3644 contains only one exhibit, Judge's Exhibit 1, which is the decertification petition with the names of the signers redacted. In addition, counsel for the ASW incorporated into the record his opening statement (Tr 521). The remainder of the transcript and exhibits are not part

For the Regional Director to dismiss the petition based on an unfair labor practice of the employer, there must be a causal relationship between the unfair labor practice and the employee dissatisfaction:

"For the disaffection to be attributable to the unfair labor practices, they "must have caused the employee disaffection... or at least had a 'meaningful impact' in bringing about that disaffection." *Deblin Mfg. Corp.*, 208 N.L.R.B. 392 (1974). In short, there must be a causal relationship between the unlawful conduct and the petition of August-September 1982. *Olson Bodies, Inc.*, 206 NLRB 779 (1973)." *Master Slack Corp.*, 271 NLRB 78, 84 (1984).

The evidence of that causal connection must be substantial:

We have consistently held that the Board must adduce <u>substantial evidence</u> to support its finding that an employer's unfair labor practices tended to undermine a union's majority support. *Quazite Div. of Morrison Molded Fiberglass Co. v. NLRB*, 87 F.3d 493 (D.C. Cir. 1996) (emphasis added).

In addition to being substantial, the evidence must be specific:

"there must be <u>specific proof</u> of a causal relationship between the unfair labor practice[s] and the ensuing events indicating a loss of support." *Champion Home Builders Co.*, 350 NLRB 788, 791 (2007) (emphasis added).

As the Board observed in Saint Gobain Abrasives, Inc., 342 NLRB 434 (2004):

[I]t is not appropriate to speculate, without facts established in a hearing, that there was a causal relationship between the conduct and the disaffection. To so speculate is to deny employees their fundamental Section 7 rights. *Id.* at 434.

Under *Master Slack*, the Board resolves "the issue of causation" under a multifactor test:

- (1) the length of time between the unfair labor practices and the filing of the petition:
- (2) the nature of the alleged acts;
- (3) any possible tendency to cause employee disaffection; and
- (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

The question before the Regional Director was whether the record in 7-RD-3644 demonstrated the kind of substantial and specific causal relation which would justify dismissing the decertification petition and depriving the employees of their Section 7 rights.

### SUMMARY OF RELEVANT EVIDENCE AND SUMMARY OF ARGUMENT

There is no dispute that the employees in this case were dissatisfied with the ASW. There is no dispute that the required 30% of the unit (and more) signed the decertification petition because they were dissatisfied with the ASW. The question is whether their dissatisfaction was **caused** by an unfair labor practice of the employer. Based on the facts set forth in the record in this matter, it is impossible to conclude that the dissatisfaction in this case was caused by an unfair labor practice of the employer.

It is irrational to argue that an event was caused by something that happened after it. In the present case, the only unfair labor practice occurred on March 1, 2009. But the vast majority of the employees who signed the decertification petition did so before that date. In this case, the question of why the employees were dissatisfied is answered by observing when they became dissatisfied.

I

# THE PETITION SHOWS ON ITS FACE THAT THE EMPLOYEE DISSATISFACTION EXISTED PRIOR TO THE UNFAIR LABOR PRACTICE; THEREFORE, THE UNFAIR LABOR PRACTICE COULD NOT HAVE CAUSED THE DISSATISFACTION

The evidence indisputably shows that before March 1, a very significant number of employees were already so dissatisfied with the ASW that they signed the decertification petition. (Judge's Exhibit 1) The decertification petition itself thus establishes that the employee

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<sup>&</sup>lt;sup>3</sup> Although that determination has been appealed by the employer and it may be determined that there was no unfair labor practice, the CEA will speak of the unfair labor practice based on the current state of the record, i.e., as having occurred. The CEA's references to the unfair labor practice as having occurred should not be construed as either concurrence in, or rejection of, the Board's determination

dissatisfaction preceded the unfair labor practice. Although the petition was not filed until April 14, 2009, all of the signatures were affixed long before that date. Of the 104 employees who signed that petition, 70, i.e., more than two-thirds of the signers (constituting 34% of the 204 employees in the petitioned-for unit) had signed on or before February 28. Signing a petition to decertify a union is a clear indication that the employee is already dissatisfied with the union. It is logically impossible for the March 1 unfair labor practice to have caused the dissatisfaction of the employees who signed before that date.

Furthermore, there is no magic in the date of March 1. There is no evidence that the employer took any overt action on that date which could have affected employee attitudes toward the ASW. In fact, there is no evidence that the employer took any action at all on that date; March 1, 2009 was a Sunday. There is no evidence that the employees worked that day, that they received notices that day, or that the date was known to or significant to any employees. There is no evidence that even a single employee was aware on that date that the health plan had become effective. There is no testimony, exhibit or other evidence of any kind to suggest that employee disaffection increased on March 1, or that it reasonably could have increased on that date. All that appears to have occurred on March 1 was an invisible accounting transaction somewhere in the computers of the health plan provider and in Comau's payroll department.

Because there is no objective evidence to support any suggestion that employee dissatisfaction increased on March 1, there is no reason to disregard the employees who signed after that date. On Monday, March 2, another 13 employees signed the petition. By March 6, just a few days after the effective date of the new health plan, a total of 100 had signed, i.e., almost 50% of the unit.

The Regional Director's decision should be based upon objective evidence. But there is no evidence that the 34 employees who signed after March 1 did so because of the unfair labor practice. In fact, in light of the complete absence of any objective indication whatsoever that the employees were even aware of the unfair labor practice, such a conclusion is mere speculation. Such an assumption would satisfy neither the "substantial evidence" nor the "specific proof" requirements set forth by the courts and by the Board.

For these reasons, it is logically impossible to argue that the employee dissatisfaction in this case was the result of the March 1 unfair labor practice. The necessary element of causation is entirely absent, and the decertification petition should not have been dismissed.

П

## WITNESS TESTIMONY CONFIRMS THAT THE DISSATISFACTION EXISTED BEFORE THE UNFAIR LABOR PRACTICE

In order to suggest that the March 1 effective date of the health care plan "caused" or "at least had a meaningful impact" upon employee disaffection, there should be some evidence to that effect. The ASW called several witnesses in an effort to show that causal connection, but their testimony is remarkable for its uniform failure to show any such connection. There was no testimony that any employee became dissatisfied on or after March 1, and no evidence that even a single employee was aware on that date that the health plan had become effective. In fact, to the contrary, the ASW's own witnesses presented ample testimony that the employees were dissatisfied with the union and upset about the imposed health plan well before the date of the unfair labor practice.

The ASW elicited testimony from an employee named Philip Scavone. Mr. Scavone testified that he signed the petition in February, and that the health care issue had nothing

whatsoever to do with his signing the petition. He was upset because the employer had subcontracted union work to non-union workers. (Tr 529-530)

The ASW called Felix Nash. He testified that he had signed the petition because "[I]t was going to be an increase on money coming out of my check..." (Tr 542) (emphasis added) He wasn't happy about the imposed LBO. (Id) He testified that he was aware of the proposed insurance cost increases before they went into effect; he had heard about them in "several Union meetings" where he heard that, "the insurance was going to go up once we changed over to the company's new plan, and that's ... what encouraged me to sign it because I didn't want no increases..." (Tr 548) (emphasis added) He also testified that he signed the petition because the union dues under the ASW/MRCC were so high. (Id) His dissatisfaction was not caused by having the premiums taken out of his check for the simple reason that, by the time the health care plan went into effect, he had been laid off; no premiums were ever taken out of his check. (Tr 550)

The ASW then called Thomas Kalenick. He testified that he had signed the petition for a number of reasons:

"Because I didn't like what was going on. I didn't want the Union. I didn't want this medical stuff getting out of my check. I didn't want any of that; that's why I signed it because I - - it's not right, and they're enforcing a lot of things to come out of my check. I'm getting over \$100 a month with union dues, two union dues, and then now I'm getting about \$90 a month with medical." (Tr 554-555)

His testimony indicates that he had been dissatisfied with the ASW from the outset. He didn't like the ASW because he had been told in 2007 that he would lose his job if he didn't "sign the piece of paper" (apparently the MRCC dues authorization). (Tr 556) Because of the dues increase, he hadn't wanted to join the MRCC. (Tr 556)

Most importantly, he explicitly testified that he signed the petition on February 19 (Tr 558) and was aware of the pending health care changes before he signed the petition. (Tr 557-558).

Joseph Yoerg was called by the ASW. He, too, testified that he knew about the healthcare changes before he signed the decertification petition, and that he had apparently signed in February. (Tr 560) Mr. Yoerg differed from the other witnesses, in that he professed satisfaction with the ASW, but his testimony further confirms that the issues which caused the employee dissatisfaction were in place and known to the employees before March 1, 2009.

Randall Nance, also called by the ASW, testified that he signed the petition on March 2; he signed because he was unhappy with "that whole health care position," and, most importantly, that he was aware of the health care changes "a few months" before he signed it. (Tr 568, 570)

William Filbey, called by the ASW, testified that he had signed the petition on February 18 or 19, and had known about the impending health care changes before he signed it. (Tr 574) He was aware of the changes in December or January. (Tr 578-579) Dues were a big factor (Tr 580), and it didn't seem to him that the union was doing its job. (Tr 578)

The ASW's last witness, Mr. Lacey Mathis, testified that he had signed the petition on February 19 (Tr 589), and that he had been aware of the health care changes before he signed it. (Tr 585)

The ASW's witnesses are consistent in several respects:

- 1. Every one of them had signed the petition to decertify the ASW;
- 2. All but one had signed before the March 1 unfair labor practice;
- 3. Not a single one testified that their dissatisfaction increased after the unfair labor practice.

Perhaps most importantly, none of the witnesses provided any objective evidence to conclude that the unfair labor practice of March 1, 2009 could have caused them, or any other employee, to become disaffected from the ASW. Despite having the right to call any number of witnesses from among the members of the bargaining unit, the ASW was unable to establish any change in employee awareness, any change in circumstances, any change on the shop floor, or any fact of any kind which could establish any objective causal connection between the March 1 unfair labor practice and the employees' disaffection from the ASW. On the contrary, the ASW's own witnesses forcefully established that the dissatisfaction existed before that date.

Additional witnesses were called by Petitioner Willie Rushing. Claude Fradette had signed the petition (Tr 594), but specifically denied that his current contribution toward health care was the reason he had signed the petition. (Tr 596) He had favored the MRCC merger because of their promises about getting more jobs, giving the employees training, getting more work at specific plants and getting in on the work when Hollywood came to Detroit. (Tr 592-593) But it seemed to him that those promises did not come to fruition. (Tr 592)

Harry Yale testified that he had not signed the petition, but only because he was a member of the ASW bargaining committee. If he had not been a member of that committee, he would have signed it. (Tr 604). He was dissatisfied because of broken promises such as about getting jobs for laid off members. The health care plan had nothing to do with his dissatisfaction. (Tr 604)

Finally, Willie Rushing himself testified. He testified that the talk of decertification had started in the fall of 2008. (Tr 609) Mr. Rushing detailed the broken promises and misleading information which had caused him to become dissatisfied with the ASW. (Tr 610-612) Once he realized that the frequently-promised jobs were not forthcoming, it no longer made sense to him

to pay the ASW/MRCC's substantial dues. (Tr 613-614) Since he had been thinking of decertification since the fall of 2008, it is clear that he was dissatisfied long before March 1, 2009.

In the *St. Gobain* hearing, then, there was no evidence whatsoever that even a single employee had become dissatisfied following the March 1 unfair labor practice. There was ample and substantial evidence that the dissatisfaction stemmed either from earlier perceptions that the MRCC had broken promises it had made in inducing the employees to affiliate with the MRCC, or from earlier dissatisfaction resulting from the announcement of the new and costlier health plan in December, 2008, an event which was, as the Regional Director has confirmed, entirely legal. Even the ASW's witness, Randall Nance, who signed the petition on Monday, March 2, testified that he was dissatisfied because of the health care provisions, of which he had been aware for "a few months" before March 2. The record confirms that the employee dissatisfaction arose out of events prior to the unfair labor practice, and the dissatisfaction preceded the unfair labor practice. The record provides no support whatsoever for the allegation that the March 1 unfair labor practice had a meaningful impact in causing the dissatisfaction.

Ш

## BY ANY OBJECTIVE STANDARD, THE UNFAIR LABOR PRACTICE WAS NOT THE CAUSE OF THE WIDESPREAD EMPLOYEE DISSATISFACTION

Master Slack has often been described as setting forth an objective standard, i.e., the test is not whether the individuals believed that their disaffection resulted from unfair company activity, but whether the unfair labor practices in question were of a kind which could reasonably tend to cause employee disaffection. But in this case, even disregarding the logical impossibility of the effect preceding the cause, and even disregarding the testimony of the witnesses that the dissatisfaction preceded the unfair labor practice, the Master Slack standard would not establish

the necessary causal relationship between the unfair labor practice and the employee dissatisfaction. *Master Slack* does not support dismissing the petition in this matter.

In this case, there was testimony that the union had held several meetings to talk about the health care provisions in the months before the plan went into effect, i.e., before the March 1 unfair labor practice. (Tr 548) The record makes it clear that the witnesses, and by inference, the bargaining unit members in general, were aware of the health care plan provisions before the changes went into effect.

Thus, the unfair labor practice alleged against this employer was that on March 1, 2009, as the result of the passage of time, with no further action by the employer or any employee, with no publicity or announcement, at midnight on a Sunday morning, the new health care plan, the provisions of which were already universally known to the employees, went into effect. That is not the kind of unfair labor practice that would reasonably tend to create disaffection.

It is certainly true that an employer which behaves in a sufficiently egregious manner, committing multiple unfair labor practices over a significant period of time and abusing its position of strength, could influence its employees to view their union more negatively. But the case law which supports that thesis involved employer behavior which was far more aggressive than that of Comau in this case.

For example, *Master Slack* is important because it articulated the four-factor test. But the facts of that case are also important, because they point out the shallowness of the ASW's and the Regional Director's position here. In *Master Slack*, there had been a long history of serious labor violations by the employer.

Those serious and multiple efforts to derail the union should be compared to the acts of Comau in this case:

Master Slack	Comau
1. Illegally interrogating employees;	1. On March 1, 2009, the terms of a health
2. Threatening to move the plant;	care plan, previously known to the employees,
3. Threatening to close the plant;	went into effect.
4. Threatening of discharge;	
5. Actually discharging 28 employees;	
6. Refusal to bargain with the union;	
7. Unilateral changes in wages;	
8. Unilateral changes in production rates and	
quotas;	
9. Retaliatory changes in absenteeism	
enforcement;	
10. Unlawful termination of employee benefits	
in retaliation for choosing to unionize;	
11. Threats to reduce pay	
12. Threats to abolish Christmas bonuses;	
13. Threats to discharge black employees	
14. Threats to discharge employees who held	
union meetings in their homes;	
15. Threats to discharge employees who voted	
for the Union.	
Master Slack Corp., 271 NLRB 78, 79 (1984);	
Master Slack Corp., 230 NLRB 1054 (1977),	
enfd. 618 F.2d 6 (6th Cir. 1980)	

In addition, in *Master Slack*, although many of those past practices had been addressed in an earlier proceeding, there was still an ongoing back pay dispute arising out of those earlier unfair labor practices. That back pay dispute, like the imposition of new health care costs in the present case, was the subject of ongoing talk in the shop. As in the present case, the witnesses testified that the past and ongoing disputes were not the cause of their votes to decertify, and that they just wanted to be rid of their union.

The ALJ found (and the Board affirmed) that the history of serious unfair labor practices and the existence of an ongoing back pay dispute arising out of those practices were insufficient

to prevent the employees from making a free choice regarding their bargaining agent:

It surely must be concluded that there is no direct evidence of a causal relationship between Respondent's unlawful conduct of 1973-1974 and the 1982 petition. Moreover, I further conclude that the indirect factors are insufficient here to operate as a matter of law to preclude Respondent from withdrawing recognition. In view of all the circumstances here, I find that Respondent lawfully suspended bargaining on August 16, 1982, and that it lawfully withdrew recognition from the Union on September 10, 1982. 271 NLRB at 85.

Thus, in *Master Slack*, there was a lengthy and egregious past history of employer misconduct toward union organizers, and an ongoing dispute about back pay which was so much the subject of frequent discussion in the plant that, "it became an unpleasant joke," Id. at 84. Nevertheless, the ALJ and the Board allowed those union employees to vote on whether to decertify. The memory of the threats and firings, and the ongoing litigation over back pay, did not disqualify them from decertifying their union.

Likewise, in *Champion Home Builders Co.*, 350 NLRB 788, 791-792 (2007), the employer's conduct included the unlawful confiscation of union materials from an employee workstation, one-day employee layoffs, threats to close the business if picketing continued and a refusal to provide information requested by the Board. But even those unlawful practices were insufficient to justify setting aside the decertification of the union.

In *Champion Home Builders*, the Board gave examples of cases where the employer conduct was so egregious that it tainted the employees' disaffection:

In each of these cases, the violations as described by the Board were of a more serious nature and were disseminated throughout the bargaining unit. In *Beverly Health*, the violations included the employer's denying union representatives access to the employees' facility, removal of bulletin boards that were used by the union to communicate with employees, unilateral reduction in the number of work hours of some unit employees, and changing of rules regarding vacation scheduling. Id., at 29. The employer also reduced the hours of an employee and terminated another employee because of her union support. In *Penn Tank Lines*, the employer unilaterally reduced the waiting-time and lost-time pay for drivers less than a month before the withdrawal of recognition. Id. at 1067. In addition,

the employer unlawfully discharged an employee approximately 5 months before the withdrawal of recognition. In finding the employer's withdrawal of recognition unlawful, the Board reasoned that the passage of time did not diminish the impact of the employer's conduct, noting "that the discharge of an active union supporter is exceptionally coercive and not likely to be forgotten. . . . This unlawful conduct 'goes to the very heart of the Act,' and reinforces the employees' fear that they will lose employment if they persist in union activity." (Internal citations omitted). *Id.* at 792, fn 19.

There is a qualitative difference between the behavior of the employers in the preceding cases and that of Comau in this case. The fact that the previously-announced, previously-discussed and previously-disliked health plan became effective on March 1, 2009 pales in comparison with the kinds of egregious and repetitive activities in which those employers engaged. There is no evidence in the present case of an objective causal connection between the unfair labor practice and the employee disaffection.

The employees at the hearing testified to a number of reasons for their dissatisfaction with the ASW. They also testified as to the timing of that dissatisfaction. By any objective standard, to the extent that the health plan was a cause of employee disaffection, the relevant event was the imposition of the LBO on December 22, 2008. Their dissatisfaction was already in existence before the March 1, 2009 unfair labor practice upon which the ASW and the Regional Director now rely. Using the objective standard of *Master Slack* leads to the same result as the application of reason and logic, namely that the dissatisfaction could not have resulted from the March 1 unfair labor practice.

Indeed, it should be recognized that all of the arguments in this brief have been based upon the objective standard of *Master Slack*. It requires no subjective evaluation to determine whether the dissatisfaction which caused an employee to sign the petition in February could logically have been caused by a single unfair labor practice occurring on March 1. It is objectively impossible. Similarly, when an employee testifies that he became dissatisfied upon

learning of the terms of the imposed contract, and that he was dissatisfied before the health care plan took effect, it is objectively impossible to argue that the employee became dissatisfied as a result of the later event.

Thus, there is neither substantial evidence nor specific proof of a causal relationship between the unfair labor practice and the employee dissatisfaction with the union.

### **CONCLUSION**

The decertification petition should not have been dismissed, for several distinct reasons. First, the petition itself confirms that substantial employee dissatisfaction existed in advance of the March 1, 2009 unfair labor practice. More than two thirds of the employees who signed the petition, constituting 34% of the unit, did so before March 1. It is logically impossible for the unfair labor practice to have caused that dissatisfaction. Since the 30% signature requirement was satisfied before the only unfair labor practice had even occurred, the petition should have gone forward.

Second, the employees themselves, called as witnesses by the ASW, testified that their dissatisfaction existed prior to March 1. Although the objective test "does not ask employees why they chose to reject the Union" (342 NLRB at 434, fn 1) (emphasis in original), it does not preclude asking the employees when they became dissatisfied. One would assume that the ASW put forth its best case and presented its best witnesses at the hearing, yet every witness who expressed dissatisfaction clearly indicated that the dissatisfaction had arisen **before** the March 1 unfair labor practice. Again, a causal relationship between the unfair labor practice and the dissatisfaction was not established by the evidence, and indeed, cannot be established in this case.

Third, by any objective standard, the effective date of a health plan, the costs and burdens of which are already known to the employees, is not of such a nature that it alone would cause so much dissatisfaction that a fair election is impossible. In fact, by any objective standard, it is clear that the dissatisfaction was the result of the earlier, legal, imposition of the LBO which set forth those costs, and which made it clear to the employees that they would incur those costs in the future.

In this case, to avoid the result compelled by the evidence and the law, the Regional Director has created new and apparently unlimited legal theories, granting himself the right to combine entirely legal acts with illegal ones to create an amorphous "continuum" to be used at his discretion, and declaring that an employee's anticipation of a possible event is indistinguishable from the later occurrence of the event itself. These theories are unsupported by either law or reason, and should be rejected by the Board.

The application of logic, the testimony of the witnesses, and the use of the objective standard all result in a consistent and sensible result. The March 1, 2009 unfair labor practice did not cause the employee dissatisfaction, and the petition for decertification should be permitted to go forward.

### REQUEST FOR RELIEF

For all of these reasons, the CEA respectfully requests that the Board reverse the Decision and Order of the Regional Director and remand the case to the Regional Director with instructions to direct an election.

Respectfully submitted,

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P32320

# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD SEVENTH REGION

COMAU, INC.

**Employer** 

and Case 7-RD-3644

AUTOMATED SYSTEMS WORKERS LOCAL 1123, A Division of MICHIGAN REGIONAL COUNCIL OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Union

and

WILLIE RUSHING, an Individual,

Petitioner

and

COMAU EMPLOYEES ASSOCIATION (CEA)

Intervenor

### **PROOF OF SERVICE**

I hereby certify that on December 27, 2010, I caused to be served via **electronic mail** a copy of the following: **Intervenor's Request For Review of Decision and Order of the Regional Director** and this **Proof of Service** upon the following:

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